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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-344

In the Matter of the Vessel MARINE SULPHUR QUEEN
MARINE SULPHUR TRANSPORT CORPORATION,

As Owner, Petitioner,

—and—

MARINE TRANSPORT LINES, INC.,

As Demise Charterer,
Petitioner,

BETHLEHEM STEEL CORPORATION,

Impleaded Respondent,
Respondent,

UNITED STATES FIRE INSURANCE COMPANY OF NEW YORK,

Cargo Claimant,
Respondent,

IDA RUTH HEARD, *et al.*,

Death Claimants,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR DEATH CLAIMANTS-RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Southern District of New York (Cannella, J.) is reported at 312 F. Supp. 1081 and is printed in petitioners' Appendix, pp. 47a-90a. The opinion of the Court of Appeals for the Second Circuit is reported at 460 F. 2d 89, and is printed *infra*, Appendix, pp. 20a-46a.

The decisions of the Court of Appeals denying the petitions of MSTC and MTL for rehearing and rehearing *in banc* are not reported but are printed in petitioners' Appendix, pp. 91a-95a.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether the courts below were foreclosed from finding unseaworthiness based on extensive proof to that effect, merely because of the pre-disaster issuance of certificates or approvals by the U. S. Coast Guard and American Bureau of Shipping without hearings or notice or opportunity to be heard as to whether such certificates or approvals be granted?

2. Whether the courts below properly applied a presumption of causation to an otherwise unexplained sinking under sea conditions which a seaworthy ship could have been reasonably expected to weather, after a factual finding that the vessel was unseaworthy?

3. Whether mere receipt by petitioners of certificates or approvals from the U. S. Coast Guard and the Ameri-

can Bureau of Shipping, without administrative hearing thereon, bars the District Court as trier of the facts from denying petitioners' application for limitation of liability?

Statutes Involved

The pertinent statutes are adequately included in the petition.

Statement of the Case

The ship here involved, the Marine Sulphur Queen, and her entire crew of 39 officers and men were lost in the Gulf of Mexico on or about February 4, 1963 in weather and sea conditions that were found by the courts below not to be a threat to shipping and which caused no loss or damage to any other vessels (P.A. 35a-36a).*

The demise charterer of the vessel, Marine Transport Lines, Inc. (MTL) was the 100% owner of Marine Sulphur Transport Corporation (MSTC) which owned the vessel (P.A. 24a, 25a).**

The District Court found, on the basis of the evidence that the ship was unseaworthy in many respects. The Court of Appeals reviewed and affirmed the finding of unseaworthiness (P.A. 30a-31a). This conclusion was based, among other things, on the weakening of the vessel by the conversion, and the hazards which arose be-

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* References to the Petition will be designated by "P" followed by the page number; and to Petitioners' Appendix by "P.A."

** In the Pre-Trial Order in the District Court, during the trial and in the Court of Appeals, the petitioners made no effort whatsoever to distinguish between themselves.

cause of the manner in which the vessel was loaded and operated after the conversion was completed (P.A. 27a-29a). Since some unseaworthy conditions developed after the conversion and were held not to be the fault of Bethlehem Steel Corporation (Bethlehem), the Court of Appeals ruled that the claims against Bethlehem be dismissed, reversing the District Court on that issue (P.A. 39a).

The SS Esso New Haven, a T-2 tanker constructed in 1944 designed to carry unheated petroleum products, underwent substantial structural modification in 1960 to be converted into the first vessel of her kind, the Marine Sulphur Queen, a carrier of molten sulphur which began operating in January 1961.

Prior to the conversion, non-technical personnel of Marine Transport Lines, Inc. (MTL) set the following specifications and criteria for the reconstruction of the vessel without the benefit of any naval architect's advice or opinion: (1) No new vessel was to be built for the carriage of molten sulphur; an old vessel was to be converted; (2) The type of vessel to be converted had to be a T-2 tanker; (3) The cost of the conversion could not exceed $1,650,000; (4) The cargo capacity could be no less than 15,100 long tons (P.A. 25a).

Bethlehem contracted to design and convert the 16-year old T-2 tanker into the molten sulphur carrier within those specifications and criteria. As noted by the Court of Appeals, the concept, design, conversion and operation of the MARINE SULPHUR QUEEN for the carrying of molten sulphur ". . . was largely the owner's experiment, to which the officers and men of the ship had been committed." (P.A. 30a)

After the conversion, the life projected for the vessel as a molten sulphur carrier was an additional 15 years. After just two years of service the ship was lost at sea.

After an investigation was conducted by the United States Coast Guard at which petitioners were represented by counsel, the Coast Guard refused to allow the design for the MARINE SULPHUR QUEEN to be used again (P.A. 71a). Petitioners took no action to have this administrative determination set aside.

Petitioners claim (1) that the ship had obtained the approvals and certificates required of every American flag vessel by the U. S. Coast Guard and *ipso facto* no finding of unseaworthiness could be made and that MTL and MSTC were thereby entitled to limitation of liability; (2) that since there were no survivors and because there were not one but a multitude of unseaworthy conditions, it could not be proven how the loss occurred and that MTL and MSTC were entitled to prevail on the issue of causation.

Unlike *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104 (1941), there has been no reliance upon any "presumption" that the vessel was *unseaworthy*. Unseaworthiness, was established "to the satisfaction of the trial court" which believed that "an inference of liability of the shipowner for the mysterious loss of his vessel should not be lightly drawn" and found that such unseaworthiness had been "clearly" proven (P.A. 75a, 76a).

Both courts below gave full consideration to the part that the U. S. Coast Guard and American Bureau of Shipping played with respect to the conversion of the vessel and its operation as a molten sulphur carrier, MTL's contract with Bethlehem called for the approval

of the conversion plans on behalf of MTL by George G. Sharpe & Co., professional naval architects who had not been previously consulted with respect to the decisions to convert a T-2 tanker to a molten sulphur carrier. Bethlehem's first plan drawn to meet these requirements was submitted to MTL, the Coast Guard and the American Bureau of Shipping. The plan was submitted by MTL to George G. Sharpe & Co., whose principal naval architect advised MTL on May 17, 1960 that:

> "A preliminary study . . . indicates the design to be deficient in transverse strength. All the main transverse bulkheads in the center tanks of the original tanker have been removed. *We believe it will be necessary to restore at least three of these bulkheads* and divide the sulphur tanks into two or three longitudinal tanks with cofferdams between. Longitudinal top and bottom girders and transverses in way of sulphur tanks have been reduced below what is considered good practice. It may be possible to make up this deficiency by increased thickness of materials in these structural members, but this will require a detailed study. *Correction of the above-deficiencies will result in the reduction of the specified cargo deadweight of from 3 to 5%.*" (Emphasis as added by the Court of Appeals) (P.A. 55a)

Bethlehem received a similar reaction to this plan from the American Bureau of Shipping and the Coast Guard which then delegated authority to approve the plans and specifications to the American Bureau of Shipping.

Greatly concerned, since the 3 to 5% reduction in cargo carrying capacity would result in a cargo capacity of less than 15,100 tons, MTL sent Bethlehem a copy of the let-

ter from Sharpe Co. and wrote Bethlehem on May 17, 1960 as follows:

> "The remarks contained herein are quite disturbing to us; however, we feel that from our preliminary discussions you will be able to meet all necessary classifications and Coast Guard requirements in order that we may guarantee our Charterer the specified deadweight carrying capacity of not less than 15,100 long tons of molten sulphur."

To meet the requirement of MTL that the cargo capacity of the vessel not fall below 15,100 long tons, Bethlehem did not provide for the three or more complete transverse bulkheads recommended by the naval architect or by the American Bureau of Shipping in its initial views, but modified its previous plan so as to provide only one complete transverse bulkhead.

MTL did not send the modified plan to the George G. Sharpe & Co. or any other naval architect for review. MTL took no steps to forward the Sharpe & Co. letter of May 17, 1960 to the Coast Guard or to the American Bureau of Shipping, and MTL took no steps to see that Bethlehem did so. The American Bureau of Shipping, which had not seen the George G. Sharpe letter ,succumbed to Bethlehem's approach and passed Bethlehem's modified plan, thereby resulting in Coast Guard approval as well.

Because the MARINE SULPHUR QUEEN was unique, the knowledge of American Bureau of Shipping surveyors and U. S. Coast Guard inspectors was minimal. The knowledge available to MTL was far greater than that available to the Coast Guard or the American Bureau of Shipping, the reverse of the situation with respect to ordinary cargo vessels and ordinary tankers. Many of the

unseaworthy conditions found by the District Court were to be corrected at a shipyard overhaul that had been scheduled to take place in January 1963. This overhaul did not take place before the disaster because it was postponed by MTL. Coast Guard and American Bureau of Shipping inspectors were not informed of the existing unseaworthy conditions, all of which were known to headquarters personnel of MTL through the receipt of repair lists, log books, overtime records and cargo reports. Coast Guard and American Bureau of Shipping inspectors never comprehended that loading the vessel, even below her marks, could dangerously adversely affect the cargo tank ventilation system. Petitioners, who had the plans, could easily determine this. The 1963 Coast Guard inspection was characterized by a regular officer of the MARINE SULPHUR QUEEN who was not on the fatal voyage, as a "flying inspection."

In view of the overwhelming evidence as to the vessel's unseaworthiness, the clear proof that the weather and seas through which the vessel sailed would not cause the loss of a seaworthy ship, and the documented relationship between each unseaworthy condition and petitioners' senior management, the courts below perforce denied exoneration from and limitation of liability to MTL and MSTC.

Reasons for Denying the Writ of Certiorari

I.

Upon extensive factual evidence the Court below properly found the vessel to be unseaworthy and was not debarred from such finding because certificates and approvals had been issued before the disaster by the U. S. Coast Guard and American Bureau of Shipping without any administrative hearing or notice with opportunity to be heard.

Petitioners argue that the pre-disaster certificates and approvals of the United States Coast Guard and the American Bureau of Shipping foreclosed any proof of the unseaworthiness of the MARINE SULPHUR QUEEN. In doing so they rely upon a series of cases wherein administrative action taken after notice and full opportunity to be heard was upheld by this Court (P. 16-17). No such administrative action ever took place before the loss of the MARINE SULPHUR QUEEN.*

Evidence of the approvals and certificates of the Coast Guard and the American Bureau of Shipping was received, as was evidence of the scope of investigation and participation which led up to the granting of such approvals and certificates. The record shows that MTL and MSTC had knowledge as to the deficiencies of the conversion design which they did not pass on to the Coast

* After the disaster the United States Coast Guard conducted a formal investigation at which petitioners were parties and were represented by counsel and fully participated. As the result of this investigation, the Commandant of the U. S. Coast Guard made a determination that the same conversion should not be approved again.

Guard or the American Bureau of Shipping. They had knowledge of the problems and difficulties encountered in the operation of the vessel that they did not pass on to those agencies. MTL and MSTC knew and the Coast Guard and the American Bureau of Shipping did not know how much cargo could be loaded into the vessel before effectiveness of the cargo venting system would be dangerously reduced, although the load line limit would not be surpassed. The knowledge and experience of MTL and MSTC with respect to the carriage of molten sulphur surpassed that of the Coast Guard and the American Bureau of Shipping.

Bare compliance with statutory and regulatory law does not fulfill the obligation to furnish a seaworthy vessel. *Schlichter* v. *Port Arthur Towing Co.*, 288 F.2d 801, 804 (5th Cir.) *cert. denied* 368 U. S. 828 (1961); *Walker* v. *Harris*, 335 F.2d 185, 196 (5th Cir.) *cert. denied* 379 U. S. 930 (1964). Certificates cannot be equated with seaworthiness, *Waterman Steamship Corp.* v. *Gay Cottons*, 414 F. 2d 724, 738, 739 (9th Cir. 1969); *States Steamship Co.* v. *United States*, 259 F.2d 458 (9th Cir. 1957).

The District Court as finder of the facts on the issue of seaworthiness, exhaustively analyzed all the relevant facts, including the facts surrounding the granting of the certificates of the Coast Guard and the Shipping Bureau approval, and concluded that the vessel was unseaworthy. That determination was not disturbed by the Circuit Court.

II.

The ruling of the courts below on causation were not in conflict and were consistent with the decisions of this and other courts.

In affirming the District Court's ruling on causation the Second Circuit said "[W]e agree with the trial court that the weather conditions at the time of the disappearance of the vessel were expectable. While there were strong winds and rough northerly seas during the early hours of February 4th, this was by no means extraordinary, nor did it represent a situation which a seaworthy ship could not have been reasonably expected to weather." (P.A. 35a). The Circuit Court as well as the District Court noted the evidence that many vessels sailed under the circumstances existing on the date of the disaster and at other times including a vessel high and light (a less favorable condition than that of the laden Marine Sulphur Queen). The Circuit Court concluded:

> "An owner has a duty to provide a vessel that can withstand expectable weather, *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960) and when a vessel goes down in such weather, a reasonable inference that proven aspects of unseaworthiness were the cause of the loss will stand. See e.g., *Sabine Towing Co.* v. *Brennan*, 72 F. 2d 490, 493-94 (5th Cir.), *cert. denied*, 293 U. S. 611 (1934)." (P.A. 36a)

Emphasizing the unseaworthiness of the vessel, as factually determined by the District Court, the Circuit Court stated that "[A]s the list of unseaworthy aspects of the vessel grows longer, the inference becomes increasingly

more reasonable that these aspects, as a group, were the proximate cause of the loss."* (P.A. 35a)

And where, as here, a vessel is lost and there are no survivors to provide proof causation ". . . the requirement of legal cause can be supplied by inference, when as here there is negligence/unseaworthiness on the one hand and an unexplained disappearance of a vessel at sea on the other." *Admiral Towing Company* v. *Woolen,* 290 F.2d 641, 652 (9th Cir. 1961). See also *Ingham* v. *Eastern Air Lines Inc.,* 373 F.2d 227 (2d Cir.) *cert. denied,* 389 U.S. 931 (1967).

Nor did the courts below break any new ground in applying a presumption or inference of causation in a situation other than "calm" waters. This Court has held that "The standard [for seaworthiness] is . . . a vessel reasonably suited for her intended service." *Mitchell* v. *Trawler Racer Inc.,* 362 U.S. 539, 550 (1960). The applicable rule was stated in *Walker* v. *Harris,* 335 F.2d 185, 193

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* Under the Jones Act, 46 USC § 688, which incorporates by reference the Federal Employees Liability Act, 45 USC § 51, proof of causation in terms of "might be" is adequate. *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 361 U.S. 107 (1959). The test of causation for the fact-finder is simply whether the proofs justify with reason that employer negligence played any part in producing the injury; it does not matter that from the evidence the fact-finder may also, with reason, on grounds of probability attribute the result to other causes. *Gallick* v. *Baltimore & Ohio R. Co.,* 372 U.S. 108, 116 (1963), *Rogers* v. *Missouri Pacific Railroad Company,* 352 U.S. 500, 506-5507 (1957) reh. *denied* 353 U.S. 943 (1957), *Schulz* v. *Pennsylvania Railroad Company,* 350 U.S. 523 (1956), *Lavender* v. *Kurn,* 327 U.S. 645 (1946), *Tennant* v. *Peoria & P.U. Ry. Co.,* 321 U.S. 29 (1944). While the Court of Appeals did not find it necessary to resort to the Jones Act to resolve the issues of the case, application of these cases would have mandated the same conclusion as to causation.

(5th Cir.) *cert. denied,* 379 U.S. 930 (1964), a case involving heavy weather:

> "[It is] familiar doctrine so often invoked where vessels sink in calm waters, that sinking (or other failure) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of unseaworthiness. Although not articulated in such terms, it is a sort of sea going *res ipsa loquitur.*"

Thus the substantive test for presumptive causation is not limited to a vessel lost in a "calm" sea but, as the Second Circuit stated in another case, to a vessel with "sufficient integrity to meet the ordinary perils of the sea." *Federazione Italiana déi Corsorzi Agrari* v. *Mandask Compania De Vapores S.A.,* 338 F.2d 434 (2d Cir.) *cert. denied,* 393 U.S. 828 (1968).

Petitioners appear to assert that there is an exclusive and immutable "calm" sea doctrine governing causation presumption simply because a number of cases have involved a "calm" sea situation and because the courts there have noted the existence of that factual situation. Raising one such fact to the eminence of a doctrine or "legal principle" (P. 21) governing ships lost at sea, does violence to the embracing effect of a legal doctrine or principle. As noted above, the applicable *substantive* doctrine or legal principle, as the court below held, is the duty of the vessel owner "to provide a vessel that can withstand expectable weather" (P.A. 36a) or as stated in other words by the Fifth Circuit, a vessel that must "reasonably anticipate and overcome" circumstances and conditions. *Walker* v. *Harris, supra.* The "calm" sea cases fall within that principle as do cases where the sea is less than calm but wholly expectable, as was the case here.

III

The District Court and the Court of Appeals properly determined as a fact that petitioners were privy to and had knowledge of the unseaworthiness of the vessel.

The conversion of the MARINE SULPHUR QUEEN and her operation as a molten sulphur carrier "was largely the owner's experiment to which the officers and men of the ship had been committed." (P.A. 30a).

From the receipt of the letter of the George C. Sharpe Co. showing the structural weakness of the conversion, to the receipt of the log books, overtime records, cargo reports and repair lists while the vessel was in operation, senior management personnel of Petitioners were fully advised as to the unseaworthy conditions of the MARINE SULHUR QUEEN (P.A. 37a-38a).

The existence of approvals and certificates from the United States Coast Guard and the American Bureau of Shipping does not obliterate such privity and knowledge. *States Steamship Co.* v. *United States of America*, 259 F.2d 458, 470 (9th Cir. 1957); *Federazione Italiana Dei Corsorzi Agrari* v. *Mandask Compania De Vapores*, 388 F.2d 434-439 (2d Cir.), *cert. denied*, 393 U.S. 828 (1968). In *Coryell* v. *Phipps*, 317 U.S. 406 (1943), relied upon by petitioners, the shipowner's possession of the required certificates was insufficient to warrant a finding of lack of knowledge or privity.*

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* *La Bourgogne* 210 U.S. 95 (1908) cited by petitioners, involved no more than a question of whether regulations of the administrative agency, with which there had been complete and total compliance were consistent with the statutes pursuant to which they had been enacted. 210 U.S. at 131-134. *The South Coast* 71 F.2d 891 (9th Cir.) cert. denied, 293 U.S. 627 (1934) is also inapposite since there was simply no proof of any unseaworthy condition.

MTL and MSTC were hardly in the position of those who rely on the superior knowledge and expertise of an administrative agency and who passively acquiesce in its determinations. This case does not pose the issue of whether any such passive reliance and acquiescence should be considered to entitle the shipowner to limitation of liability (P.A. 37a-38a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

HERBERT J. DE VARCO,
Counsel for Death Claimants-Respondents and Chairman of the Proctors' Committee on Behalf of Death Claimants.

DAVID SCRIBNER,
DONALD E. KLEIN,
HERBERT J. DE VARCO,
GEORGE J. DUFFY,
BURTON EPSTEIN,
HERBERT LEBOVICI,
ENRICO S. SANFILIPPO,
JACK WEINBERGER,
DOUGLAS A. JACOBSEN,
STEPHEN FIELDS,
Of Counsel